happens to lease premises to other retail or service establishments." S. Rep. No. 145, 87th Cong., 1st Sess. 41.

The Court of Appeals went on to stress that the building owners should not be brought under the Act simply because they dealt with a large real estate management company. This is true but also beside the point, since we deal here with that large management company as a party and, for purposes of this case, as an employer of the employees in question. We do not hold, nor could we in this case, that the individual building owners in *their* capacity as employers [5] are to be aggregated to create some abstract "enterprise" for purposes of the Fair Labor Standards Act.[6]

It is argued that such a straightforward application of the statutory criteria to the respondent's business ignores the significance of the dollar volume limitation included in the § 3 (s) definition of "enterprise engaged in commerce or in the production of goods for commerce." The Court of Appeals cited evidence in the legislative history of the 1961 amendments that indicates a purpose to exempt small businesses from the obligations of the Act. 444 F. 2d 609, 613; S. Rep. No. 145, 87th Cong., 1st Sess. 5. If the individual building owners are en-

[5] As both the District Court and the Court of Appeals noted, the statutory concept of "employer" is ". . . any person acting directly or indirectly in the interest of an employer in relation to an employee. . . ." 29 U. S. C. § 203 (d). This definition was held to be broad enough that there might be "several simultaneous employers." 444 F. 2d 609, 611–612, 324 F. Supp. 987, 992. See also *Wirtz* v. *Hebert*, 368 F. 2d 139; *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. 2d 655.

[6] Contrary to the view taken by the dissent, we specifically do not hold that "the buildings and the management company collectively are an enterprise . . . ." We deal solely with the management company and *its* "related activities performed . . . for a common business purpose."

gaged in enterprises too small to come within the reach of the Fair Labor Standards Act, reasoned the Court of Appeals, it would be "anomalous" to treat them as a single enterprise subject to the Act "merely because they hire a rental agent who manages other buildings." 444 F. 2d, at 614. Once again, however, the response to this argument is that it is the respondent management company, not the individual building owners, that has been held in this case to be an "employer" of all the affected "employees." Furthermore, the proper measure of the respondent's size has been held to be the gross rentals produced by properties under its management. It is true that one purpose of the dollar volume limitation in the statutory definition of "enterprise" is the exemption of small businesses, but this respondent is not such a business under these holdings of the Court of Appeals.[7] The argument to the contrary amounts to a collateral attack on the "employer" and "gross sales" determinations made below, and the respondent cannot make such an attack in the absence of a cross-petition for certiorari.[8]

We hold that the District Court was correct in aggregating all of the respondent's management activities as a single "enterprise." Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

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[7] It is stipulated that in all relevant years, the annual gross rental income collected by the respondent exceeded $1,000,000. 324 F. Supp. 987, 993.

[8] We have granted certiorari in *Falk* v. *Brennan, sub nom. Falk* v. *Shultz*, — U. S. —, No. 72-844, to consider whether the proper measure of "gross sales" in this context is gross rentals collected or gross commissions, and whether maintenance employees are "employees" of the management company within the meaning of the Act.

SUPREME COURT OF THE UNITED STATES

No. 71-1598

Peter J. Brennan, Secretary of Labor, Petitioner, *v.* Arnheim and Neely, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February 28, 1973]

MR. JUSTICE WHITE, dissenting.

It is undisputed that for the minimum wage and maximum hour requirements of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U. S. C. § 201 *et seq.*, to apply to all the employees involved in this case, they must be employed in an "enterprise engaged in commerce or in the production of goods for commerce."[1] 29 U. S. C. §§ 203 (s), 206, and 207. An "enterprise" for the purpose of the Act "means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose . . . ." *Id.*, § 203 (r). An enterprise, however, does not include the related activities performed for the enterprise by an independent contractor nor other specified arrangements, including other-

[1] As discussed in the majority opinion, the Act as passed in 1938, 52 Stat. 1060, covered only employees "engaged in commerce or in the production of goods for commerce." The 1961 amendments, 75 Stat. 65-67, 69, greatly broadened the scope of the Act by adding the "enterprise" concept to cover those employees not directly engaged in commerce or in the production of goods for commerce but employed by an "enterprise" that was. Therefore, those employees in this case not engaged in commerce or in the production of goods for commerce, must belong to an "enterprise" so engaged, if they are to be covered.

wise independent establishments occupying premises leased to them by the same person. *Ibid.*

But for an "enterprise" to be "engaged in commerce or in the production of goods for commerce," the enterprise must have an "annual gross volume of sales made or business done" in an amount not less than the specified statutory minimum. *Id.*, § 203 (s). Congress did not intend to cover all establishments by expanding the coverage of the Act through the enterprise approach. Instead, it drew an economic line. "It is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage." S. Rep. No. 145, 87th Cong., 1st Sess., 5. Nor was the definition of enterprise intended to swallow up the exclusion of small businesses. Related activities conducted by separate businesses would be considered a part of an enterprise only "where they are joined either through unified operation or common control into a unified business system or economic unit to serve a common business purpose." *Id.*, at 41. And the express exemptions provided in § 203 (r) from the enterprise concept, the Senate Report said, would "insure that a small local independent business, not in itself large enough to come within the new coverage, will not become subject to the Act by being considered a part of a large enterprise with which it had business dealings." *Ibid.*

In the case before us nine separately and independently owned buildings leasing space to tenants employed the same management company as agent to recommend tenants, collect rents, hire, fire, and supervise employees, and maintain and operate the buildings. The Court holds that even if none of the individual building owners would itself generate gross rentals in sufficient amount to be covered by the Act, the buildings and the management company collectively are an enterprise with collective gross rentals in excess of the statutory minimums

and hence covered by the Act.[2] Because it appears to me that the Court is applying the concept of enterprise in a way which ignores the economic limitations in the Act and congressional intention they represent, I respectfully dissent.

There is no connection between these separately owned buildings other than the fact that they employ the same management company to represent them. They have a common managing agent, but that agent is separately accountable to, and must follow the perhaps diverse directions of, each of its principals. They have no unified operation, do not constitute a unified business system or an economic unit, and surely do not serve a common business purpose. Hence there is no "enterprise" within the meaning of the Act which covers only those "related activities" performed through unified operation or common control "for a common business purpose."

As I have indicated, Congress was not unaware of the possibility of stretching the concept "enterprise" beyond its proper bounds and sought to guard against it. The Senate Committee said: "Thus the mere fact that a group of independently owned and operated stores joined together to combine their purchasing activities or to run combined advertising will not for these reasons mean that their activities are performed through unified operation or common control and they will not for these reasons be considered a part of the same 'enterprise.'" S. Rep. No. 145, 87th Cong., 1st Sess., 42. Common agents, therefore, are not sufficient to convert otherwise independent entities into an enterprise.

The Committee also said: "There may be a number of different types of arrangements established in such cases. The key in each case may be found in the answer

[2] If I agreed that the building owners and their common agent were an "enterprise," I would also agree that the cumulative gross rentals would be the proper measure of coverage.

to the question, 'Who receives the profits, suffers the losses, sets the wages and working conditions of employees, or otherwise manages the business in those respects which are the common attributes of an independent businessman operating a business for profit?' " *Id.*, at 42.

Under this standard there can be no question that the buildings are separate economic units and should be treated as such. The manager receives merely a commission for his services. The managing agent manages, but is subject to direction by his principal. The income and expenses for each building are accounted for separately. The owners of each building receive the profits and suffer the losses, if any. Each owner sets the wages and working conditions for each building in the sense that although the manager negotiates such matters, he negotiates under instructions, and it is each owner who must approve them. Each building carries a separate employer identification number. Employees are hired with respect to each building, and supplies and other items necessary for the operation of the buildings are purchased separately for each building. Should a particular building terminate its relationship with the manager, the building employees remain with the building.

The Arnheim and Neely agency unquestionably was an "employer" in so far as its relationship to each of the buildings was concerned, for 29 U. S. C. § 203 (d) defines the term employer as including "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ." But this is a far cry from concluding that the separate buildings and their common agent constitute an enterprise engaged in commerce.[3]

[3] This is demonstrated by 29 CFR § 779.203, which provides that the "terms ['employer,' 'establishment,' and 'enterprise'] are not synonymous."

Unquestionably it is the individual owner who bears the burden of the Act and if any one of them, or each of them, individually has gross sales less than the jurisdictional minimums mentioned in the Act, constructing the work "enterprise" concept as the majority does distorts clear congressional intent.